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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

ALBERT HOELSKEN and LEONARD AMATO, d/b/a ACTIVE RUBBISH SERVICE,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO and JAKE SCHLAGEL, d/b/a AURORA AND EAST DENVER TRASH DISPOSAL, individually and as a representative of a class of persons similarly situated, Et AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Opinion Below

The opinion of the Supreme Court, State of Colorado, printed in Appendix A hereto, infra, p. 15, is reported in 425 p. 2d 39.

Jurisdiction

The opinion below was filed March 13, 1967. A period of fifteen days is allowed for the filing of a petition for

rehearing following the filing of the opinion by the court. Rule 118 (c), Colorado Rules Civil Procedure. 1963 C.R.S., Vol. 1. Petition for rehearing was filed below, March 28, 1967. (R 96C) The petition for rehearing was denied, April 3, 1967. (R 97)

Jurisdiction of the Supreme Court to review this case on Petition for Certiorari rests upon 28 U.S.C. 1257 (3).

Question Presented

Whether the Petitioners have been deprived of their property without due process of law and denied equal protection of the laws by the State of Colorado in the classification of their "ash and trash" business, wholly private in nature and wholly unaffected with public interest, as a public utility subject to state regulated monopolization.

Constitutional Provisions and Statutes Involved

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In accordance with Rule 23 (d) of this Court, the following citations are made of the constitutional provisions and Colorado statutes involved in the case. The same are set forth verbatim in Appendix B. infra, p. 21.

(1) Article XXV, Constitution of the State of Colorado, vesting in the Public Utilities Commission of the State of Colorado the power to regulate public utilities.

(2) 1963 CRS. 115-9-1(4)(a), defining a "motor vehicle carrier,"

(3) Session Laws, 1965, p. 932, enacted May 6, 1965, amending 1963 C.R.S. 115-9-1(4)(a), to include the business of transportating ashes and trash within the definition of a motor vehicle carrier.

(4) 1963 C.R.S. 115-9-2, declaring all motor vehicle carriers to be public utilities.

(5) 1963 C.R.S. 115-9-4(1), requiring of all motor vehicle carriers a certificate of public convenience and necessity.

(6) Senate Bill No. 208, General Session, Colorado Legislature, 1967, signed into law June 16, 1967, not officially reported, adding a provision to 1963 C.R.S. 115-9-5, providing that the doctrine of "regulated competition" shall prevail in the future issuance of certificates of convenience and necessity.

(7) 1963 C.R.S. 115-10-1, defining a "commercial carrier by motor vehicle".

(8) 1963 C.R.S. 115-10-3, requiring of all commercial carriers by motor vehicle a permit from the Public Utilities Commission.

(9) 1963 C.R.S. 115-11-1(i), defining a "private carrier by motor vehicle".

(10) Senate Bill No. 80, General Session, Colorado Legislature, 1967, effective July 1, 1967, not officially reported, amending 1963 C.R.S. 115-11-1(i) to include

the business of transporting ashes and trash within the definition of a private carrier by motor vehicle.

(11) 1963 C.R.S. 115-11-3, requiring of all private carriers by motor vehicle a permit from the Public Utilities Commission.

Statement of the Case

Petitioners, on March 2, 1962, and under and pursuant to the Uniform Declaratory Judgments Law, 1953 C.R.S. 77-11-1, filed their amended complaint in the District Court, City and County of Denver, State of Colorado, naming therein as defendants certain of the Respondents here, including the Public Utilities Commission of the State of Colorado. (R 37-41)

Petitioners set forth in the complaint that they were engaged in the business of removing waste materials from the premises of certain persons in the County of Arapahoe, State of Colorado (R38); that the service rendered was that "of cleaning up and removing waste materials from the premises of their customers, and that such waste material was not the property of the customer en route to the point of disposal (R.39); that the transportation of the waste material from the customers' premises to the dumps was incidental to the service rendered by them. (R 38)

It was further alleged that Petitioners had been notified by an agent of the Colorado Public Utilities Commission that they were operating their business unlawfully, having failed to obtain a certificate of public convenience and necessity from the Commission. (R 38) The complaint set forth,

"7. That in attempting to regulate the business of plaintiffs and all other persons similarly situated the de-

fendant, Public Utilities Commission, acted in excess of its statutory jurisdiction in requiring plaintiff to obtain a certificate from the said Commission to operate a business not contemplated or expressed within the class of motor vehicle carriers set forth in the aforesaid statutes of the State of Colorado.

"8. That the action of the Public Utilities Commission in attempting to regulate a business not within its statutory authority deprives the plaintiffs and all other persons similarly situated of their property without due process of law and denies to them equal protection of the law, contrary to the Constitutions of the State of Colorado and the United States of America." (R 40)

Prayer was made, inter alia, for decree declaring that the Public Utilities Commission, State of Colorado, be and is without power, jurisdiction or authority to regulate in any manner the business of Petitioners and all other persons similarly engaged in the removal of various waste materials within the State of Colorado. (R 41)

The Respondent, Public Utilities Commission, made answer setting forth, in part, "that while it has had some doubt in the past, and presently has some doubt as to its jurisdiction over those carriers who remove various waste materials, including the Plaintiffs, it has and does presently believe that it has such jurisdiction, and has exercised such jurisdiction for approximately the last 15 years". It was further alleged that the "ash and trash" business, including the business of the plaintiffs, comes within the regulatory powers of the Commission by virtue of 1953 C.R.S. Chapter 115 and Article XXV of the Constitution of the State of Colorado. (R 50) Further answer was filed by the individual Respondents appearing here, Petitioners' business com-

petitors, also affirmatively alleging that the "ash and trash" business comes within the regulatory powers of the Public Utilities Commission. (R 53-54; 65-67)

Trial was had to the district court, sitting without a jury, February 24, 1965. (R 35) Thereafter, and effective as of that date, the trial court entered its findings of fact, conclusions of law and judgment. (R 75-80)
In substance the trial court found:

(a) That the business of Petitioners is that of hauling ashes, trash, rubbish and similar material to various dumps for disposal.

(b) That such material does not constitute "property" as that term is employed in the applicable Colorado statutes.

(c) That the principal service rendered in the business was the removal of rubbish from the customers' premises and that transportation of the rubbish to the dumps is not "transportation of property" as contemplated in the applicable Colorado statutes.

(d) That the transportation involved is incidental to the primary purpose of removing rubbish from the premises. (R 78-79)

The trial court thereupon permanently enjoined the Public Utilities Commission 'from in any way attempting to regulate the plaintiffs in their business of hauling ashes, trash and other waste material or from in any way attempting to exert its authority over the plaintiffs." (R 80)

At the time of disposition by the trial court, February, 1965, the applicable Colorado statute defining a motor vehicle carrier, 1963 C.R.S. 115-9-1(4)(a), was silent with respect the "ash and trash" business. Rather it em-

braced, generally, those engaged in using a motor vehicle as a common carrier to transport persons or property for compensation. In May of 1965 the Colorado legislature amended that statute to specifically include as motor vehicle carriers those serving the public "in the transportation of ashes, trash, waste, rubbish, and garbage, to and from disposal sites". See Session Laws, 1965, p. 932, Appendix B. *infra* p. 22. We might also note at this juncture that the Colorado legislature in 1967 session amended the statute defining private carriers by motor vehicle to include those engaged in the business of transporting ashes and trash. 1963 C.R.S. 115-11-1(i); Senate Bill No. 80, General Session, 1967, not officially reported. See Appendix B, infra, p. 25.

Following the entry of judgment by the trial court, the Public Utilities Commission took no steps to have the judgment reviewed in the Colorado Supreme Court. Motion for New Trial was filed by the individual Respondents (R 69-70) and denied. (R. 74) At the behest of the individual Respondents, the matter was reviewed by the Colorado Supreme Court and the judgment below reversed.

It was determined by the state Supreme Court, on the sole premise of "contemporaneous construction", that the legislature had for years intended that the business in question be classified a public utility.

The constitutional issue here presented, i.e., that Petitioners have been deprived of their property without due process of law and have been denied the equal protection of the laws, was first raised by complaint filed in the trial court. (R. 40) The trial court determined that the Public Utilities Commission had no regulatory powers of and over the "ash and trash' business for, as it was found upon

the evidence presented at trial, those engaged in such business were not transporting property of others within the meaning of the statute.

The Motion for New Trial filed by the individual Respondents made no assertion relative the doctrine of "contemporaneous construction." (R 69-70) The memorandum brief filed in support of that Motion made no argument concerning the matter. (R 72-73) Review was had by the Colorado Supreme Court on a record containing only the pleadings, findings and conclusions, and judgment. There was no transcript of the evidence presented before the trial court included within the record on review. That record is before this Court.

Relying upon well established principles that the Colorado Supreme Court will not consider matters outside the record, will not consider arguments and theories not presented to the trial court, and must, in the absence of a transcript, presume that findings and conclusions of the trial court are correct, *Lambert v. Haskins,* 128 Colo. 433, 263 P.2d 433; *Burton v. Garner,* 150 Colo. 529, 374 P. 2d 707; *Howard v. Lester,* 153 Colo. 199, 385 P. 2d 121; *Stratton Cripple Creek Mining & Develop. Co. v. Ellison,* 42 Colo. 498, 94 Pac. 303, the constitutional proscription against the state regulatory powers here asserted was not presented in the first instance to the Colorado Supreme Court. When that Court, without reference to the above principles, made the determination that it did make, Petitioners clearly and unequivocally asserted in Petition for Rehearing that the opinion and decision ran counter to the Federal Constitution. (R 96C, p. 7) That Petition for Rehearing was denied. (R 97)

Argument

These Petitioners have been denied their property without due process of law and have been denied the equal protection of the laws.

> The proposition has been judicially determined:
> "What we hold here is that in attempting to grant a monopoly of the private business of trash collection to appellant's competitors, the Corporation Commission has assumed a power which is neither granted by the statute nor authorized by the Arizona Constitution and the exercise of which is forbidden by both the Arizona and Federal Constitutions. Every business in the state is subject to public control in some respects. This does not mean that because "regulated monopoly" has been accepted as a method of regulating public service corporations that the state, either administratively or legislatively, can, without reason, grant monopolies in all businesses."

So spoke the Supreme Court of Arizona in *Visco v. State*, 95 Ariz. 154, 388 P. 2d 155 at 165. The reasoning there employed renders the stated conclusion inescapable.

> "Appellant's industry is a clear example of the type of industry to which all manner of health regulations might be applied. But this Court has already warned against the fallacy that because health regulations may, and should be adopted in certain businesses, the state is not thereby free to adopt economic regulations. Edwards v. State Board of Barber Examiners, 72 Ariz. 108, 231 P. 2d 450 (price fixing for barbers); State v. Borah, supra, (51 Ariz. 318, 76 P. 2d 757) (medical regulation amounting to monopoly); State v. Childs, 32 Ariz. 222, 257 P. 366, 54 A.L.R. 736; and

Stewart v. Robertson, 45 Ariz. 143, 40 P. 2d 979 (monopoly provisions for benefit of registered pharmacists). In all of these cases the decisions were based upon both the Fourteenth Amendment to Federal Constitution and Sec. 4 of Art. II of the Arizona Constitution. Both are applicable here. Indeed the instant case is more flagrant, since the cases cited involved only class monopolies, whereas here the monopoly attempted to be granted by the state to appellant's competitors is an individual monopoly." (388 P.2d at 164)

The point made by the Arizona court is of course patently clear. Every business is subject to some sort of state regulation. But a private business, i.e. a business which is not "affected with a public interest" and is not a "public service corporation", cannot be made the subject of a state regulated monopoly. The "ash and trash" business is such a business. The state may, in the proper exercise of its police power, regulate that business insofar as may be necessary to protect the health and safety of its populace. The state may not, under any guise, constitutionally bestow upon one or some engaged in that business a monopoly to the end that others are or may be excluded entirely from engaging in the same business.

The statutory scheme regulating motor vehicles in Arizona and Colorado are dissimilar. As *Visco* makes clear, 388 P. 2d at 158, the theory of "regulated monopoly" applies only to the common carrier and not to the private carrier. In Colorado private carriers, as well as common motor vehicle carriers, are governed by the doctrine of "regulated monopoly". That is the holding of *Public Utilities Commission v. Stanton Transportation Co.*, 153 Colo. 372, 386 P. 2d 590.

These differences created an issue in the Arizona case not present here: an abortive legislative attempt to grant monopolies in a private business by expanding the definition of a common carrier to include private carriers. That issue, certainly, in no wise distinguishes *Visco* from the instant cause, for the pivotal point, both here and there, is the constitutional prescription against the state grant of partial or entire monopolies in a private business wholly unaffected with public interest.

The recent legislative appellation, "regulated competition", given by the Colorado legislature in 1967 Session to the issuance of public convenience and necessity certificates, is of no moment here. Senate Bill No. 208, 1967 Session, effective June 16, 1967, not officially reported, (Appendix B, infra, p. 23) provides that such a certificate shall not be deemed an exclusive grant or monopoly and that the doctrine of "regulated competition" shall prevail. But it was further provided that,

> "The Commission shall have authority to grant more than one certificate of public convenience and necessity to operate motor vehicles for the transportation of property over and along the same route or a part thereof, if the Commission finds that the present or future public convenience and necessity requires or will require such operation."

Whatever the legislature might have meant by the undefined term, "regulated competition", is a question which need not be answered here. No one would argue the proposition that the test for issuing certificates of public convenience and necessity was at any time material here ever different than the test set forth in Senate Bill No. 208. The state Supreme Court having stated that Colorado follows the doctrine of "regulated monopoly", it becomes obvious that so long as

the substantive law remains unchanged, the doctrine remains unchanged.

But assuming that existing law has been changed, which it has not, nevertheless had Petitioners not been unconstitutionally constrained from lawfully engaging in their business prior to Senate Bill No. 208, their right to engage in that business would have been secured unto them and wholly unaffected by the passage of any law changing doctrinal concepts of utility regulation.

The decision of this Court in *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, was referred to in *Visco*, and the opinion therein quoted at some length. 388 P. 2d at 160. Well might also the opinion of this Court in *New State Ice Co. v. Liebmann*, 285 U.S. 262 be referred to. What was therein said and quoted hereinbelow remains, we submit, as constitutionally sound today as when uttered. The diminishing effect had upon certain early Fourteenth Amendment property decisions of this Court, if they may with propriety be so called, by such cases as *Nebbia v. New York*, 291 U.S. 502, *Olsen v. Nebraska*, 313 U.S. 236, *Beard v. City of Alexandria*, 341 U.S. 622, leaves untouched the following statement of *Liebmann*:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " (285 U.S. at 278)

That the legislature might be imposed upon to say that a wholly private business is affected with public interest and thereby subject to monopoly regulation, as the Colorado legislature has now said with respect the "ash and trash" business, or that the Colorado Supreme Court might say that the legislature always intended that such business be considered a public utility, is of course quite immaterial. A business does not become a public utility or one affected with public interest by mere legislative fiat. See *Visco v. State*, supra, *Hertz Corp. v. Heltzel*, 217 Or. 205, 341 P. 2d 1063, *Hertz Drivurself Stations v. Siggins*, 359 Pa. 25, 58 A. 2d 464, 474. See also *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 at 536:

> "It is manifest from an examination of the cases cited under the third head that the mere declaration by a Legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."

In the instant case the Supreme Court of Colorado determined, and did so upon the sole premise of "contemporaneous construction", that the legislature had for years intended that the "aash and trash" business was within the ambit of administrative regulatory power and was, therefore, subject to monopolization. That construction is forbidden by the guaranties of due process of law. The same must, perforce, be said of the subsequent amendatory efforts of the legislature to specifically characterize this private business as a public utility.

Conclusion

We respectfully submit for the foregoing reasons that this petition for a writ of certiorari should be granted. The decision below is precisely contrary to that of a highest court of a sister state. The decision below is not in comport with the pronouncements of this Court respecting the guaranties of the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX A
IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

No. 21790

JAKE SCHLAGEL, et al. *Plaintiffs in Error,*

ALBERT HOELSKEN, et al., *Defendants in Error.*

DAY J.

This matter is here on writ of error to the Denver district court, wherein is sought the reversal of a judgment declaring and decreeing that the Public Utilities Commission of the State of Colorado is without authority to regulate those engaged in the business of hauling ashes, trash and other waste material within the State of Colorado. In addition to the declaratory judgment, the court entered an injunction preventing the Public Utilities Commission from regulating or in any manner interfering with the businesses of the defendants and others similarly engaged.

Defendants in error, as plaintiffs in the trial court, had been engaged in removing various waste materials from premises in Arapahoe County when they were ordered by the Public Utilities Commission to cease and desist on the ground that they were operating unlawfully in that they had failed to obtain a certificate of public convenience and necessity from the Public Utilities Commission, pursuant to C.R.S. 1963, 115-9-1 et seq. They then applied to the Commission for a certificate, but their application was denied on the ground that public convenience and necessity did not warrant the issuing of additional certificates in the

county, which was already served by other certified carriers, such as Jake Schlagel, d/b/a Aurora and East Denver Trash Disposal, one of the plaintiffs in error and a named defendant in the trial court.

The decisive question for our determination on this writ of error is:

> *Was the trial court correct in determining that those engaged in the business of hauling ashes, trash and other waste material are not a "motor vehicle carrier" as defined in C.R.S. 1963, 115-9-1 (4) (a) and therefore are not a public utility as defined in C.R.S. 1963, 115-9-2 and 3?*

We answer this question in the negative.

We hold that the trial court was in error and that the businesses affected by the trial court's ruling are a public utility and subject to regulation by the commission within the purview of the statute.

Section (4) (a), *supra,* defines a motor vehicle carrier as:

> "* * * every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court whatsoever, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of the transportation of persons or property for compensation as a common carrier over any public highway between fixed points or over established routes, or otherwise, whether such business or transportation is engaged in or transacted by contract, or otherwise."

The trial court held, inter alia, that ashes, trash, rubbish and similar material being transported by the persons

here involved do not constitute property within the meaning of the above statute. The court then reasoned that because the various trash haulers are not engaged in either the transportation of persons or property they are not within the act. With this construction of the trial court we do not agree.

Although it is not an easy matter to define the word "property," when one examines the various decisions from other jurisdictions, we nevertheless hold that the word as applied to the act here in Colorado was intended to and does embrace the transportation for hire of matter and things which the parties herein remove from various households and establishments and haul to nearby dumps. In *Masgai v. Public Service Commission of Pennsylvania,* 124 Pa. Super. 370, 188 Atl. 599, the court there clearly stated:

> "Nor can we accept the argument of appellant that because his dump trucks are frequently used in the haulage of garbage, ashes, cinders, and other refuse to the dump or incinerator, that such materials are not property as contemplated by the common carrier section of the Public Service Company law. Although the owner of such materials may regard them as of no value, still the right to their possession and the need for their disposal are within the control of the individual owner. All of these materials have certain valuable uses under varied circumstances, and even though the owner desires to dispose of or destroy such materials, the right of property continues until disposed of or destroyed. In performing such disposal service, appellant was clearly engaged in business of a common carrier."

Again, in *State v. Diamond Tank Transport,* 2 Wash. 2d 13, 97 P. 2d 145, we find the following apt quotation:

"The question then arises whether the garbage which respondent contracted to collect, haul, and dispose of had a property value. The specifications which, as stated, were a part of the contract, defines 'garbage' as follows: 'Garbage shall be held to mean and include all accumulations of household waste matter which has been discarded as of no further value to the owner thereof, including ashes, cinders, trade waste, lawn cuttings, grass, rags, bottles, papers, broken household furniture, small dead animals, boxes, barrels, shrubs, small trees, small limbs of trees, scraps of boards of lumber, hollow material or ware; rubbish in general, and every accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking, storage or handling of meat, fish, fowl, fruits or vegetables; * * *

"Whether all of the things mentioned in this definition have a property value it is not necessary here to determine; but such things as ashes, cinders, broken household furniture, and vegetable matter, and at least some of the others, have. Masgai v. Public Service Commission, 124 Pa. Super. 370, 188 A. 599; Jansen Farms, Inc., v. City of Indianapolis, 202 Ind. 138, 171 N.E. 199, 72 A.L.R. 514; City of Indianapolis v. Ryan, 212 Ind. 447, 7 N.E. 2d 974; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 25 S. Ct. 100, 50 L. Ed. 204. The respondent was a contract carrier, and without a permit from the department of public service was operating illegally."

Although this court has heretofore not been confronted with this question, and even though some of the comments of other jurisdictions are helpful, yet we need not resort to them to determine what is meant to be included under the

term "property." The business in which the parties herein are engaged has been subject to Public Utilities Commission regulations for a period of more than twenty years. Every one entering such business has invariably applied to the Public Utilities Commission for permission so to do, and there are now outstanding about 400 certificates, all of which constitute a valuable property right. Thus in interpreting the statute we must look to the long-continuing contemporaneous construction of the act by the legislature, the public officials charged with its administration, and by the public itself. It is to be noted that the legislature, *knowing fully well that the business has been regulated by the Public Utilities Commission,* has made no move in more than two decades to exempt such business from regulation. Then in 1965 (see 1965 Perm. Supp., C.R.S., 115-9-1 (4) following the decision of the Denver district court in this case, it amended C.R.S. 1963, 115-9-1 (4) expressly to include in the definition of "motor vehicle carrier," as follows: "any motor vehicle used in serving the public in the business of transportation of ashes, trash, waste, rubbish, and garbage, to and from disposal sites, and in the course of operations." By this enactment the legislature did not change the law; it merely clarified it. The action of the legislature was, in our view, a specific ratification of the interpretation given the general act by the Public Utilities Commission and the public over the many, many years in which the businesses herein affected were developed under regulation.

The judgment is reversed and the cause remanded to the trial court to vacate its declaratory judgment and the injunc- and to dismiss the action.

MR. JUSTICE HODGES not participating.

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

No. 21790

JAKE SCHLAGEL, et al.
vs.
ALBERT HOELSKEN, et aal.

Plaintiffs in Error
Defendants in Error

JUDGMENT

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annuled and altogether held for naught; and that this cause be remanded to said District Court with directions to vacate its declaratory judgment and the injunction and to dismiss the action.

It is further ordered and adjudged that said plaintiffs in error do have and recover of and from said defendants in error their costs in this court expended to be taxed. (96A-96B)

APPENDIX B

(1) Constitution of the state of Colorado, Article XXV:
"In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

"Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities."

(2) 1963 C.R.S. 115-9-1(4)(a)
"The term 'motor vehicle carrier' when used in this article means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court whatsoever, owning, controlling, operating or managing any motor vehicle used in serving the public in the business of the transportation of persons or property for compensation as a common carrier over any public highway between fixed points or over established routes, or otherwise,

whether such business or transportation is engaged in or transacted by contract, or otherwise."

(3) Session Laws, 1965, p. 932, amending 1963 C.R.S. 115-9-1 (4) (a), enacted May 6, 1965, 1963 C.R.S. Permanent Supplement, 1965:

"* * * and said term 'motor vehicle carrier' shall specifically include every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court whatsoever, owning controlling, operating, or managing any motor vehicle used in serving the public in the business of transportation of ashes, trash, waste, rubbish, and garbage, to and from disposal sites, and in the course of operations."

(4) 1963 C.R.S. 115-9-2:

"All motor vehicle carriers as defined in this article are hereby declared to be public utilities within the meaning of articles 1 to 7 of this chapter, and are hereby declared to be affected with a public interest and subject to this article and to the laws of this state, including the regulation of all rates and charges, now in force or that hereafter may be enacted, pertaining to public utilities, so far as applicable, and not in conflict therewith."

(5) 1963 C.R.S. 115-9-4 (1)

"No motor vehicle carrier, as defined in subsection (4) of section 115-9-1, shall hereafter operate any motor vehicle for the transportation of either persons or property, or both, upon the public highways of this state, without first having obtained from the commission a certificate declaring that the present or future public convenience and necessity requires or will require such operation. * * * (the statute was amended by Session

Laws, 1965, p. 933 to specifically include "motor vehicles used for transporting ashes, trash, waste, rubbish, and garbage, in general service to the public." 1965 Permanent Supp. to 1963 C.R.S. 115-9-4)

(6) Senate Bill No. 208, General Session, Colorado Legislature, 1967, signed into law by Governor, State of Colorado, June 16, 1967, not officially reported, added an additional section to 1963 C.R.S. 115-9-5:

"(2) The granting of any certificate of public convenience and necessity to operate a motor vehicle for hire, for the transportation of property, shall not be deemed to be an exclusive grant or monopoly, and the doctrine of regulated competition shall prevail. The Commission shall have authority to grant more than one certificate of public convenience and necessity to operate motor vehicles for the transportation of property over and along the same route or a part thereof or within the same territory or a part thereof, if the Commission finds that the present or future public convenience and necessity requires or will require such operation."

(7) 1963 C.R.S. 115-10-1:

"(1) As used in sections 115-10-1 to 115-10-14 the term 'commercial carrier by motor vehicle' means every corporation or person, lessee, trustee, receiver or trustee appointed by any court whatsoever, other than motor vehicle carriers as defined by subsection (4) of section 115-9-1, or a private carrier by motor vehicle as defined by subsection (1) (i) of section 115-11-1, owning, operating, controlling or managing any motor vehicle used in the transportation of property sold or to be sold by him or it in the furtherance of any private commercial enterprise, or property of which such per-

son or corporation is the owner or lessee when transported for the purpose of lease or rent, over any public highway of this state between fixed points or over established routes, or otherwise."

(8) 1963 C.R.S. 115-10-3:

"(1) It shall be unlawful for any commercial carrier by motor vehicle, as defined in section 115-10-1, to engage in the transportation of property over the public highways of the state of Colorado without first having obtained a permit therefor from the public utilities commission of the state of Colorado. It is hereby declared that the use of the public highways by commercial carriers by motor vehicle is affected with a public interest and that the safety and welfare of the public traveling upon such highways, the preservation and maintenance of the same, and the proper regulation of motor vehicle common carriers using the highways require the regulation of commercial carriers by motor vehicle to the extent provided in sections 115-10-1 to 115-10-14, and the commission upon application shall issue a permit to a commercial carrier by motor vehicle, and may attach to such permit and to the exercise of the rights granted thereunder, such terms and conditions as are reasonable, and consistent with the safety of the public.

"(2) Sections 115-10-1 to 115-10-14 shall not apply to any motor vehicle carrier as defined by section 115-9-1, or to any private carrier by motor vehicle as defined by section 115-11-1, nor shall anything contained in sections 115-10-1 to 115-10-14 be construed or applied so as to compel a commercial carrier by motor vehicle to be or become a common carrier, or to subject such commercial carrier by motor vehicle to the

laws or rules and regulations applicable to a common carrier or a private carrier by motor vehicle, unless such commercial carrier by motor vehicle is also engaged in the business of transporting persons or property for compensation or hire as a motor vehicle common carrier, or as a private carrier by motor vehicle."

(9) 1963 C.R.S. 115-11-1(i):

"The term 'private carrier by motor vehicle' means every corporation or person, lessee, trustee, receiver or trustee appointed by any court whatsoever, other than motor vehicle carriers as defined by subsection (4) of section 115-9-1, owning, controlling, operating or managing any motor vehicle in the business of transporting persons or property of others for compensation or hire over any public highway of this state between fixed points or over established routes, or otherwise, by special contract or otherwise."

(10) Senate Bill No. 80, General Session, Colorado Legislature, 1967, effective July 1, 1967, not officially reported, amending 1963 C.R.S. 115-11-1(i):

"(1) (i) The term 'private carrier by motor vehicle' means every corporation, person, firm, association of persons, lessee, trustee, or any receiver or trustee appointed by any court whatsoever, other than motor vehicle carriers as defined by subsection (4) of section 115-9-1, owning, controlling, operating, or managing any motor vehicle in the business of transporting persons or property of others for compensation or hire over any public highway of this state between fixed points or over established routes, or otherwise, by special contract or otherwise; and said term "private carrier by motor vehicle', as defined above, shall specifically include every corporation, person, firm, as-

sociation of persons, lessee, trustee, or any receiver or trustee appointed by any court whatsoever, other than motor vehicle carriers as defined by sub-section (4) of section 115-9-1, owning, controlling, operating, or managing any motor vehicle in the business of transporting ashes, trash, waste, rubbish, and garbage to and from disposal sites, for compensation or hire over any public highway of this state between fixed points or over established routes, or otherwise, by special contract or otherwise."

(11) 1963 C.R.S. 115-11-3:

"(1) It shall be unlawful for any private carrier by motor vehicle, as defined in section 115-11-1, to engage in or transact the business of transporting passengers, freight, merchandise or other property over the public highways of the state of Colorado, without first having obtained a permit therefor from the public utilities commission of the state of Colorado. It is hereby declared that the business of private carriers by motor vehicle as defined in this article, * * * "

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 308

ALBERT HOELSKEN and LEONARD AMATO,
d/b/a ACTIVE RUBBISH SERVICE,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO and JAKE SCHLAGEL, d/b/a AURORA AND EAST DENVER TRASH DISPOSAL, individually and as a representative of a class of persons similarly situated, Et Al

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

Set forth verbatim as Appendix A to the Petition.

JURISDICTION

Petitioners state jurisdiction is conferred by 28 U.S.C. 1257(3), which respondents challenge.

28 U.S.C. 1257(3) requires, as here pertinent, that the validity of a state statute as being repugnant to the Federal Constitution must be drawn into question in the court below.

The question raised below is set forth at page 5 of the Petition as follows:

> 8. That the action of the Public Utilities Commission in attempting to regulate a business not within its *statutory* authority deprives the plaintiffs and all other persons similarly situated of their property without due process of law and denies to them equal protection of the law, contrary to the Constitutions of the State of Colorado and the United States of America. (R 40) (*our emphasis*)

This is simply a question of statutory interpretation to determine whether persons engaged in the transportation of ashes and trash are within the ambit of the Colorado statute.

The Supreme Court of Colorado held that persons engaged in the ash and trash business were within the statutory jurisdiction of the Public Utilities Commission. This decision, on nonfederal grounds, then completely nullified the federal question raised below.

It is a well settled rule that this Court not only accepts, but is bound by the construction given state statutes by state courts and that such construction is not subject to review, even though the effect of such construction is to remove any repugnancy to the Federal Constitution. See, among others, *Quong Ham Wah Co.* v. *Industrial ACC. Commission of California,* 255 U.S. 445, 448 (1921); *Tampa Waterworks Co.* v. *Tampa,* 199 U.S. 241 (1905); Price v. *Illinois,* 238 U.S. 446 (1915); *Aero Mayflower Transit Co.* v. *Board of R.R. Com'rs of State of Montana,* 332 U.S. 495

(1947); *Thornton* v. *Duffy*, 254 U.S. 361 (1920); and *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509 (1932).

Petitioners now present an entirely new federal question for review by this Court, i.e., "whether the Legislature of the State of Colorado can constitutionally include persons engaged in the transportation of ashes and trash within the regulatory control of the Public Utilities Commission?".

A party who has raised but one federal question in the state court cannot in the United States Supreme Court argue, in addition thereto, another not raised in the courts below. *Dewey* v. *City of Des Moines, Iowa*, 173 U.S. 193, 197, 198 (1899); *Keokuk & H. Bridge Co.* v. *Illinois*, 175 U.S. 626, 633-635 (1900); and *Wilson* v. *Cook*, 327 U.S. 474, 483 (1946).

That the present question was not raised in the first instance to the courts below is admitted by petitioners, for at page 8 of their Petition it is stated:

> . . . *the constitutional proscription against the state regulatory powers here asserted was not presented in the first instance to the Colorado Supreme Court.* When that Court, without reference to the above principles, made the determination that it did make, Petitioners clearly and unequivocally asserted in Petition for Rehearing that the opinion and decision ran counter to the Federal Constitution. (*our emphasis*)

A federal question raised for the first time on a petition for rehearing, after judgment has been rendered by the state court, comes too late for consideration by the United States Supreme Court. See *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U.S. 682, 689 (1893); *McMillen* v. *Ferrum Mining Co.*, 197 U.S. 343, 347 (1905); *Kansas City Star Co.* v. *Julian*, 215 U.S. 589, 590 (1909); *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 116, 127 (1923); *Live Oak Water Users' Asso.* v. *Railroad Commission*, 269 U.S. 354,

357 (1926); and *Herndon* v. *Georgia,* 295 U.S. 441, 442, 443 (1935).

We recognize that there are some exceptions to the general rule that this Court will not consider a federal question first raised on a petition for rehearing. These exceptions are where the state court actually entertained the federal question raised and decides it, see *Herndon* v. *Georgia, supra,* and where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 366 (1932).

Neither of the above exceptions are applicable to the present case. The State Supreme Court denied the petition for rehearing without giving reasons (R. 97). This does not show that the state court passed upon the federal question first raised by the petition. *Forbes* v. *Virginia State Counsel,* 216 U.S. 396, 398, 399 (1909). Also, see *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 112, 118 (1909).

The second exception, i.e., the state decision presented a new and unexpected basis of a federal claim and the petition for rehearing was the first opportunity to present the federal question, also is inapplicable. When briefs were submitted to the Colorado Supreme Court, the Colorado Legislature had amended C.R.S. 1963, 115-9-1 (4) (a) to specifically include in the definition of a "motor vehicle carrier" those persons engaged in the transportation of ashes and trash. See Appendix B of the Petition, pages 25 and 26.

The petitioners were well aware of this amendment, for an entire section of their brief in the Colorado Supreme Court was devoted to arguing that this amendment established the fact that the Public Utilities Commission did not, prior to this amendment, have authority to regulate the "ash and trash" business. In fact subheading C of heading II states:

> The Act of the Legislature of May 1965 amending the subject statute so as to thereafter include the

"ash and trash" business within the regulatory authority and powers of the Public Utilities Commission is a clear indication that such business was not so embraced and included prior to the amendment. (Page 42, Petitioners' Brief in the Colorado Supreme Court).

No argument was advanced by the petitioners in their Colorado Supreme Court brief that the legislature did not have the constitutional right to regulate the "ash and trash" business, but only that it had not been regulated prior to the 1965 amendment. The Colorado Supreme Court, however, held that by this amendment "the legislature did not change the law; it merely clarified it" (App. A of Petition, p. 24).

From all of the above it is clear that petitioners have completely failed to sustain their burden of showing that this Court has jurisdiction to review the question presented for review here. It is, therefore, respectfully requested that this Honorable Court dismiss this Petition for Writ of Certiorari on the basis of a lack of jurisdiction.

QUESTION PRESENTED

Whether the petitioners have been deprived of their property without due process of the law and denied equal protection of the laws by the inclusion by the Legislature of the State of Colorado of persons engaged in the transportation of ashes and trash under the regulatory control of the Public Utilities Commission.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes listed in the Petition are supplemented as follows:

1963 C.R.S., 115-11-3(3) — This article shall not apply to any motor vehicle carrier as defined by section 115-9-1, nor shall anything herein con-

tained be construed or applied so as to compel a private carrier by motor vehicle to the laws or liability applicable to a common carrier.

STATEMENT OF THE CASE

By decision No. 21790 dated March 13, 1967 the Supreme Court of the State of Colorado held that the Statutes of the State of Colorado imposed jurisdiction on the State Public Utilities Commission to regulate the transportation of ashes and trash. (Opinion set forth as appendix A to the petition) Petition for rehearing was denied April 3, 1967.

Based on this state court interpretation of a state statute petitioners herein under date of June 29, 1967, seek the issuance of a writ of certiorari directed to the Colorado Supreme Court on the grounds that regulation of transporters of ashes and trash by the Public Utilities Commission is repugnant to the Federal Constitution as being beyond the regulatory authority of the State Legislative. These grounds, if heretofore raised at all, were mentioned only in the petition for rehearing.

Respondents herein are comprised of the Public Utilities Commission together with the following named parties each of whom is authorized to transport ashes and trash by the Public Utilities Commission: JAKE SCHLAGEL, d/b/a AURORA AND EAST DENVER TRASH DISPOSAL, individually and as a representative of a class of persons similarly situated, DAVID BRANDT, BESTWAY DISPOSAL, a partnership, J. W. BURBACH HAULING SERVICE, COOK AND BOLGER, a partnership, HERB DALBERG, d/b/a DALBERG'S HAULING SERVICE, GEORGE FLINT, d/b/a ARVADA RUBBISH REMOVAL, METROPOLITAN TRASH, INC., GEORGE GETTMAN, JAKE GINTHER, VIC GINTHER, GRAFF'S RUBBISH REMOVAL, MARION GILREATH, d/b/a WHEATRIDGE DISPOSAL SERVICE, C. N. NIBLACK RUBBISH REMOVAL, HAROLD ROBINSON, ADAM SCHLAGEL, d/b/a A & F TRASH DISPOSAL,

GEORGE SCHIMPF, EDWARD SCHNORR and ROBERT SCHNORR, d/b/a IDEAL DISPOSAL CO., GEORGE SHAFFER, ALFRED STRASSHEIM, C. E. STRASSHEIM, ADAM TREBER & SON, a partnership, N. W. COYLE, MOUNTAIN VIEW RUBBISH REMOVAL, LAKEWOOD DISPOSAL SERVICE, ELMER LEICHNER, ROBERT LEICHNER, LARRY LEICHNER and JOHN LEICHNER, d/b/a BESTWAY, DONALD S. JOHNSON, d/b/a JOHN'S TRASH SERVICE, SANITARY GARBAGE & TRASH REMOVAL SERVICE, SANITARY GARAGE & TRASH REMOVAL CORPORATION, A Colorado corporation, BECKER'S TRASH SERVICE, INC., THOMAS E. SALMON, JR., d/b/a SECURITY GARBAGE CO., ESTES SERVICE CO., GARBAGE SERVICE CO., ESTES TRASH SERVICE, DENVER CLEAN UP SERVICE, INC., BOB JOHNSON SERVICE, DECKER DISPOSAL, INC., MONARCH DISPOSAL, ACE DISPOSAL SERVICE, DISPOSAL SERVICE CO., FREDDIE'S RUBBISH REMOVAL, ENGLEWOOD LITTLETON RUBBISH REMOVAL, RAY'S ASH & TRASH, BOULDER DISPOSAL, INC., ALEX GERLACH & SONS, and DENVER WASTE DISPOSAL.

Aforesaid parties respectfully file the within brief in opposition to the stated petition.

ARGUMENT

If this Court should determine that it has jurisdiction to review the question presented, it is clear that the question so presented does not involve any special, important or unsettled issues that warrant review by this Court.

Petitioners in seeking review of the constitutional right of the State of Colorado to regulate carriers performing intrastate for-hire motor transportation service state "these Petitioners have been denied their property without due process of law and have been denied the equal protection of the law" (Petition, p. 9).

Thus, in very broad terms they allege that they have

been deprived of their rights as protected by Amendment XIV, Section 1, of the United States Constitution (Petition, p. 2). In so arguing their 14th Amendment rights they have completely neglected to set out in any detail or specificity how the Colorado statutes deny petitioners of due process, be it procedural or substantive, nor do they set forth how and in what fashion the classification of the transportation of ashes and trash within the regulatory statutes is an unreasonable or arbitrary classification.

Colorado, in its statutory enactments concerning the regulation of motor carriers, set up three classifications of motor carriers. These classifications are (1) "Motor Vehicle Carrier", which is a common carrier, and said carriers are controlled by C.R.S. 1963, 115-9-(1-15), (App. B Petition, p. 2), (2) "Private Carrier by Motor Vehicle", which in the terms of the Interstate Commerce Act are contract carriers and their activities are controlled by C.R.S. 1963, 115-11-(1-16), (App B Petition, P. 25), and (3) "Commercial Carrier by Motor Vehicle", which are own-haul carriers, and these carriers are regulated by C.R.S. 1963, 115-10-(1-14), (App. B Petition, p. 24).

Carriers in each of the above classifications are subjected to different regulations with the most comprehensive regulations being placed on the common carriers and the least regulations placed on commercial carriers.

Every state in the Union has similar acts controlling the operation of motor carriers. In light of the numerous decisions of this Court upholding the right of states to place reasonable regulations on the operation of private carriers, as well as regulating common carriers, the petitioners' claim that they are a private business and not subject to the control of the State is absurd.

As a primary example of the states' right to regulate private, as well as common carriers, we need only refer to *Stephenson* v. *Binford,* 287 U.S. 251 (1932). This case was an appeal from the United States District Court for the Southern District of Texas, wherein, before the statu-

tory court of three judges, an injunction was sought by appellants to restrain various officials of the State of Texas from enforcement of a state statute which purported to regulate the use of its highways by motor trucks. The United States District Court denied the injunction and the case was appealed to the United States Supreme Court.

The appellants severally were engaged in the private transportation of freight by motor trucks between various cities in Texas under private contracts with shippers. While operating under these contracts the state statute regulating carriers was passed. This statute required common carriers to obtain a certificate of public convenience and necessity, and private contract carriers to obtain a permit, before they would be allowed to operate over the highways of Texas. The statute provided that such permits should be granted only after a hearing and not if the Commission should be of the opinion "that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.

The grounds upon which the statute was attacked were stated as follows:

> (1) That as applied to appellants, all of whom are private contract carriers, the result of the statute is to compel them to dedicate their property to the quasi-public use of public transportation before they can operate their motors over the highways, and thus to take their property for public use without adequate compensation and to deprive them of their property without due process of law. In other words, the alleged effect of the statute is to convert the private carriers into common carriers by legislative fiat. (2) That the business of appellants is not affected with a public interest, and the provisions of the statute so declaring in terms, or in effect, constitute an attempt to deprive appellants of their property without due process of law, and to abrogate their right of private contract. (3)

> That the statute by requiring appellants to obtain a permit in the nature of a certificate of public convenience and necessity subject them to other regulations before they can lawfully operate upon the highways, which regulations are not imposed upon other private carriers similarly situated, and thereby appellants are denied the equal protection of the laws. (4) That other regulations to which appellants are subjected are not made applicable to persons using the highways in transportation of their own commodities under substantially similar conditions, and thereby appellants are denied the equal protection of the laws." (287 U.S. at 263 and 264).

This Court in affirming the District Court's denial of the injunction and upholding the validity of the Texas statute first stated the following:

> . . . It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit. (287 U.S. at p. 264)

This Court went on to state that in light of the legislative power to regulate the use of the state highways that it was unnecessary for it to determine whether appellants were "engaged in a business impressed with a public interest" (287 U.S. 265).

In rejecting appellants' claims that the Texas statute was an attempt to convert private contract carriers into common, this court held:

> We are of opinion that neither by specific provision or provisions, nor by the statute considered as a whole, is there an attempt to convert private contract carriers by motor into common carriers. Certainly, the statute does not say so. Common

carriers by motor and private contract carriers are classified separately and subjected to distinctly separate provisions. By section 1 (h), the contract carrier is defined as "any motor carrier . . . transporting property for compensation or hire over any highway in this state *other than as a common carrier.*" It is difficult to see how the legislature could more clearly have evinced an intention to avoid an attempt to convert the contract carrier into a common carrier. It is true that the regulations imposed upon the two classes are in some instances similar if not identical; but they are imposed upon each class considered by itself, and it does not follow that regulations appropriately imposed upon the business of a common carrier, may not also be appropriate to the business of a contract carrier. (287 U.S. 265 and 266).

After thus rejecting appellants' claims that the Texas statute compelled private carriers to become common, the court went on to consider the constitutionality of the various regulations placed on the private contract carriers. These regulations were found not to be repugnant to the Constitution, not on the theory that the business in question was effected with a public interest, but on the grounds that the state in regulating the use of its highways had the right to regulate private carriers in making the highways safer, even if such regulations involve a lessening of commercial transportation. Among others, some of the legislative ends sought by the means of regulating carriers, both private and common, were found to be (1) to make the use of the highways safer and more convenient for these private operators, involving incidentally a lessening of commercial transportation on the highways, (2) unregulated truck transportation had caused a serious public problem concerning the use of the highways, (3) the great increase of contract carriers in the aggregate caused the problem the legislature tried to regulate, (4) without the regulation of private carriers the inevitable result will be the disappearance altogether of common carriers from the

roads, and (5) for the public to continue to have a safe and dependable transportation system, private carriers operating on the same roads with common carriers must be subject to reasonable regulations.

Although we perhaps have devoted too lengthy a discussion to *Stephenson* v. *Binford,* it was done so because of the similarity of the arguments used there to the arguments used in the present petition. Appellants in *Stephenson* basically raised the same contentions raised here by petitioners, i.e., (1) their business is not "affected with a public interest" and therefore not subject to state control, and (2) the Colorado statute compels them to become common carriers by mere legislative fiat.

If petitioners' first argument is not destroyed by *Stephenson* v. *Binford, supra,* then most assuredly the case of *Nebbia v. New York,* 291 U.S. 502 (1934), leaves no question that petitioners' position is untenable, for the United States Supreme Court, speaking through Mr. Justice Roberts, after citing *Stephenson* v. *Binford, supra,* with approval, stated:

> The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest" and "clothed with a public use", have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of

> its aspects, including the prices to be charged for the products or commodities it sells. . .
>
> So far as the requirement of due process is concerned, and in the absence of the constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio. "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine." *Northern Securities Co.* v. *United States,* 193 U.S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise . . ." (291 U.S. at p. 536-537)

Despite the holding in this case, petitioners none the less argue that the state cannot regulate their business of transporting ashes and trash. In support of this contention they cite at page 12 of their Petition *New State Ice Co.* v. *Liebmann,* 285 U.S. 262 (1932). *Liebmann,* however, is of little value today for as was stated in *Boylan* v. *United States,* 310 F.2d 493, 497 (9th Cir. 1962) -

> But two years after Liebmann was handed down, the Supreme Court decided Nebbia v. New York, . . . In that case the concept "affected with a public interest" was abandoned as a test to be applied in determining whether a business could, consistent

with due process, be subjected to economic regulation.

While Nebbia involved price regulation, the rationale there adopted by the court is equally applicable with regard to all economic regulations. The contrary rationale of Liebmann has not been applied or approved in any subsequent case."

(Footnotes omitted)

For an extensive annotation of additional decisions, both federal and state, upholding the right of the state to regulate both private and common carriers see 109 A.L.R. 550 (1937) and 175 A.L.R. 1333 (1948). From these and numerous other decisions there should be no question that the state legislature can adopt reasonable regulations concerning the operations of petitioners, be it common carriage or private carriage, and the right to regulate such business does not turn on the concept of "affected with a public interest", but rather turns on the question of whether the laws so regulating are arbitrary in their operation and effect. As previously pointed out, appellants have completely failed to even attempt to show that the regulation of motor carriage in Colorado is arbitrary, discriminatory and not in furtherance of the public welfare. This complete lack of evidence is adequate grounds for the refusal of this Honorable Court to grant certiorari.

Petitioners by citing such cases as *Frost Trucking Co.* v.*Railroad Commission,* 271 U.S. 583 (1926), and*Visco* v. *State,* 95 Ariz. 154, 388 P.2d 155 (1963), which cases stand for the proposition that a state cannot by mere legislative fiat compel a private carrier to become a common carrier, apparently take the position that the Colorado statutes compel them to become a common carrier. To show that this contention has absolutely no foundation we need only look at the insertion in Colorado's Private Carrier Act at C.R.S. 1963, 115-11-3(3), the following provision:

This article shall not apply to any motor vehicle carrier as defined by section 115-9-1, nor shall any-

thing herein contained be construed or applied so as to compel a private carrier by motor vehicle to the laws or liability applicable to a common carrier.

Thus, the *Visco* holding, that the transportation of ashes and trash, within the meaning of the Arizona statutes, to be a private or contract type undertaking and, therefore, not within the Arizona's common carrier statute and not being within said statute the state could not compel the private carrier to become a common carrier, is not in conflict with Colorado law since Colorado regulates the transportation of ashes and trash under both the Common and Private Carrier Act and expressly forbids the placement of private carriers under the laws and liabilities of common carriers.

In summary, the petitioners have made a general and broad attack upon the right of Colorado to regulate their for-hire transportation of ashes and trash with no showing that such regulation is unreasonable, arbitrary or unlawful. Colorado is not unique in exercising control over the transportation of ashes and trash for virtually all the states in the Union have asserted control over such transportation. For example, see *Masgai* v. *Public Service of Pennsylvania,* 124 Pa Super. 370, 188 Atl. 599 (1936); *State* v. *Diamond Tank Transport,* 2 Wash. 2d 13, 97 P.2d, 145 (1939); and *City of Wichita Falls, et al* v. *Kemp Hotel Operating Co., et al, Court of Civil Appeals of Texas, Ft. Worth,* 162 S.W. 2d 150 (1942).

For numerous years many persons, including respondents, who are engaged in business similar to petitioners, have abided by and followed the regulations that have been adopted by the Colorado Legislature. Petitioners have had equal opportunity to obtain a permit or certificate from the Colorado Public Utilities Commission. Petitioners make no claim that procedural due process has been denied them in any attempt to get a certificate. Petitioners have, therefore, completely failed to present a meritorious and

substantial federal question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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